IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Supreme Court, U. S.
FILED
JUL 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, ET AL., *Appellants,*
v.
ORRIN W. FOX CO., ET AL., *Appellees.*

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, ET AL., *Appellants,*
v.
ORRIN W. FOX CO., ET AL., *Appellees.*

On Appeal from the United States District Court for the Central District of California

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Do the challenged statutory provisions deny procedural due process in violation of the Fourteenth

Amendment by empowering private automobile dealers to invoke the state's injunctive power in adjudicatory proceedings to restrain competitors in the "same line-make" from establishing or relocating franchises in a statutorily defined 314-square-mile "relevant market area," without affording the affected parties any opportunity to be heard, without requiring any showing of good cause, and without requiring any prior or contemporaneous review by a public official?

2. Do the challenged statutory provisions violate the Supremacy Clause by empowering private automobile dealers, without a prior hearing or prior review by any state official, to invoke the state's injunctive power to impose and enforce, for a substantial period of time, horizontal territorial restraints and market allocations forbidden by the federal antitrust laws?

3. Did the court below abuse its discretion under the *Pullman* doctrine when it refused to abstain from adjudicating the foregoing constitutional issues where the court found that the Act was unambiguous and that there was no state litigation pending which might resolve or eliminate the constitutional questions, and where no uncertain issues of state law existed, the resolution of which could potentially harmonize the Act with federal constitutional requirements?

4. Should this Court now order dismissal of appellees' complaint under the *Younger* doctrine because state administrative proceedings were pending when suit was filed, even though those proceedings have long since been terminated favorably to appellees, even though the issue was not raised below, and even

though the constitutional issues could not have been decided in the administrative forum?*

COUNTERSTATEMENT OF THE CASE

The basic issue here is the constitutionality of a California statute that enables existing motor vehicle dealers to use the state's injunctive power in an adjudicatory proceeding to exclude potential competitors from a large geographic market area for an extended period of time, without any state supervision and without any hearing or other safeguard to prevent the abuse of state power by the existing competing dealers. The relevant facts follow.

In the United States, new motor vehicles are marketed primarily through networks of franchised dealerships. Franchised dealers are independent businessmen who purchase motor vehicles, parts, and accessories from a manufacturer, pursuant to the terms of franchise agreements, and resell them to the public. The manufacture, distribution, and resale of automobiles are activities that repeatedly have been held to be in interstate commerce.

States have traditionally regulated motor vehicle dealers and manufacturers in the public interest by

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* Are the challenged statutory provisions invalid under the Commerce Clause because they impermissibly burden interstate commerce?

The complaint charges that the statute violates the Commerce Clause. (A. 22-23.) The Commerce Clause argument was not included in appellees' Motion for Partial Summary Judgment in the court below, but is submitted here, *see infra* at 53 n.43, in light of recent cases invalidating similar statutes on this ground. This Court, of course, reviews judgments, not judicial reasoning, and may rely on any argument advanced in support of a judgment. *Langnes* v. *Green*, 282 U.S. 531, 535-39 (1931).

establishing standards for character, honesty, integrity, and reputation that must be met before a dealer or manufacturer will be licensed to sell new vehicles in the state. California has such a licensing system, the validity of which is *not* challenged in this action. Rather, this action challenges certain *procedural* aspects of an entirely separate California law designed primarily to further the economic self-interest of existing franchised dealers [1] by erecting substantial artificial barriers to the entry of new competition.

The challenged portions of the California Automobile Franchise Act (Act), Cal. Veh. Code §§ 3060-3069, permit existing franchised dealers to obtain, simply by asking for it, a temporary injunction of prolonged duration against the establishment or relocation of a competitive dealership for the "same line-make" anywhere in a statutorily defined 314-square-mile "relevant market area" surrounding the existing dealership.[2] The temporary injunction will remain in effect for months, until the Board decides, after a hearing, whether "good cause" exists to issue a permanent in-

[1] The interests of existing dealers are represented in this case by intervenors Northern California Motor Car Dealers Association and the Motor Car Dealers Association of Southern California, appellants in No. 77-849, who will be referred to as "Dealer Association Appellants." For clarity, appellants in No. 77-837, the New Motor Vehicle Board, the Department of Motor Vehicles, and Doris V. Alexis, will be referred to collectively as "State Appellants." The complaint also named individual members of the New Motor Vehicle Board as defendants (A. 1, 13-14), but they have not appealed.

[2] Cal. Veh. Code § 507 defines the "area within a radius of 10 miles from the site of a potential new dealership" as the "relevant market area." Thus, the Act applies to any proposed establishment or relocation within 10 miles of the place of business of an existing dealer.

junction. Nonetheless, the automatic temporary injunction issues with no prior hearing—under the Act the objecting dealer is not required to justify issuance of the injunction, the potential competitor and his franchisor are not given an opportunity to oppose it, and no state official is required to evaluate its propriety. Moreover, the statute gives this power to exclude potential competitors *only* to existing dealers—the state itself may not become involved *sua sponte*.

1. Statutory Provisions

The Act deals with a number of subjects, but these appeals concern only the procedures applicable to establishment and relocation protests.[3] If an automobile manufacturer and a proposed or existing franchisee agree to establish a new franchised dealership [4]

[3] The pertinent provisions of the Act are reproduced in their current form by Dealer Association Appellants in the Appendix to Brief for Dealer Association Appellants. The Act includes two entirely different kinds of provisions. The establishment and relocation provisions allow one or more existing dealers to interfere in the relationship between a manufacturer and another established or prospective dealer. Other provisions of the Act, not involved here, regulate the contractual relationship between a manufacturer and its franchised dealers concerning terminations and modifications of the franchise agreement and reimbursement practices. These latter provisions permit only the parties to that contractual relationship to invoke the terms of the Act. Cal. Veh. Code §§ 3060-3061, 3064-3065. Many other aspects of the manufacturer-dealer relationship are governed by Cal. Veh. Code §§ 11713.1 and 11713.2. *See also* the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225.

[4] "Establishment" of a new dealership includes the addition of a new franchise to an existing dealership (*e.g.*, the addition of a Buick franchise to a dealership previously enfranchised to sell Chevrolets), as well as the establishment of a completely new dealership. Cal. Veh. Code § 3062(a).

or to relocate an existing one,[5] and if a dealer (or dealers) for the "same line-make" already exists within a radius of 10 miles from the site of the proposed establishment or relocation (the "relevant market area"; Cal. Veh. Code § 507), the provisions of Cal. Veh. Code § 3062(a) are applicable. That section requires written notice of the proposed establishment or relocation to appellant New Motor Vehicle Board (Board) and to all existing dealers for the "same line-make" in the "relevant market area."

After receipt of this notice, any dealer for the "same line-make" (an actual or potential competitor of the proposed dealership) within this 314-square-mile area may file a "protest" against the proposed establishment or relocation with the Board. As the District Court found, this protest need be nothing more than a letter saying simply "I protest." 440 F. Supp. 436, 439 (C.D. Cal. 1977).[6] No showing of any kind is required that the proposed establishment or relocation will have any impact upon the protesting dealer, that it is in any way unfair, or that it will in any way be inimical to the public interest. Nor is any showing required that the protesting dealer has any likelihood of success on the merits.

Upon receipt of such a protest, the Board is required by the Act automatically, and without affording prior notice or opportunity to be heard, to enjoin

[5] "Relocation" of an existing dealership includes any movement of the dealership, except for a move of less than one mile within the same city. Cal. Veh. Code § 3062(b).

[6] The opinion of the District Court is reprinted as Ex. E to Juris. St. of State Appellants and App. A of Juris. St. of Dealer Association Appellants.

the manufacturer and the existing or proposed franchisee from continuing to carry out their contractual arrangements until the Board determines whether "there is good cause for not permitting such dealership."[7] Establishment or relocation of the franchise in violation of the automatic temporary injunction is criminally punishable as a misdemeanor, Cal. Veh. Code §§ 11713.2(*l*), 40000.11, and is a ground for suspension or revocation of the manufacturer's and franchisee's licenses. *Id.* § 11705(a)(3), (a)(10) (A. 56-58).

The Act thus contains no safeguards of any kind to prevent abuse of the temporary injunction provisions by existing dealers, whose sole motivation in filing a protest is often to delay the establishment of a competitive dealership for as long as possible. The Act does not require protests to be made under oath or penalty of perjury, or to contain any allegation or statement of facts supporting the protest. The Act contains no provision requiring a responsible public official to make even the slightest inquiry into the merits of the protest prior to issuance of the Board's injunction, and there is no provision whereby an enjoined party may seek to quash or modify an injunction improvidently issued. Finally, the protestant is not required to post a bond, and the affected parties therefore have no way to recover damages occasioned by protracted delay even if the protest ultimately proves to have been completely groundless.

[7] "When such a protest is filed, the board *shall* inform the franchisor that a timely protest has been filed . . . and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing . . . , nor thereafter, if the board has determined that there is good cause for not permitting such dealership." Cal. Veh. Code § 3062(a) (emphasis added).

Once a protest has been initiated and an injunction has automatically been granted, § 3066(a) of the Act requires the Board to set a hearing on the merits of the protest. Following the hearing, a permanent injunction may issue if, but only if, the Board determines that the protesting dealer has shown "good cause" for it. Cal. Veh. Code §§ 3062(a), 3066(b).[8] This hearing, which may be delayed for 60 days or more,[9] is the first opportunity of any kind for the enjoined manufacturer and dealer[10] to be heard. *Compare id.* § 3066(a) *with id.* § 3062(a). And no matter what is shown when the hearing is finally held, the temporary injunction continues in effect for an indefinite, additional time until the Board makes a final decision.

This indefinite, additional delay beyond the 60 day period occurs because the Board may, and normally does, elect to refer protests to a hearing officer rather than itself conducting a hearing on the merits in the first instance. *Id.* § 3066(a).[11] When such a referral is

[8] "Good cause" is statutorily defined in Cal. Veh. Code § 3063.

[9] The court below held that § 3066(a) requires the hearing to be held within 60 days after issuance of the temporary injunction. 440 F.Supp. at 438. The court also noted, however, that the Board has sometimes calendared hearings substantially after issuing a temporary injunction, *id.*, and substantial time elapses after the hearing before the Board renders a final decision. *See infra* at 8-9. The temporary injunction remains in effect during this entire period. *See infra* at 9.

[10] The new or relocating dealer may present evidence and argument at the hearing. He is not a party, however, and has no right to cross-examine witnesses or to appeal from an adverse decision. Cal. Veh. Code §§ 3066(a), 3068.

[11] Appellees are unaware of any Board proceeding involving the establishment or relocation of a franchised dealership that has *not* been referred to a hearing officer for initial consideration.

made, the Act imposes no time limit within which the hearing officer must submit his proposed decision to the Board. Upon eventually receiving the proposed decision, moreover, the Board may (1) adopt that decision, (2) reach an independent decision on the existing record, (3) take additional evidence, or (4) refer the matter back to the hearing officer for the taking of additional evidence. Cal. Gov. Code § 11517.[12] If the Board takes no action at all within 30 days after receiving the hearing officer's proposed decision, the proposed establishment or relocation is deemed approved. Cal. Veh. Code § 3067. If the Board follows any of the last three courses open to it under Cal. Gov. Code § 11517, however, there is *no* statutory limit on the time it can take to decide a case. Without even a requirement of reasonableness, the Act simply provides that a decision must be rendered "within such period as may be necessitated by Section 11517 of the Government Code." Cal. Veh. Code § 3067. The automatic temporary injunction remains in effect throughout this entire period, even if the hearing officer has concluded that the protest is without merit.

Two particularly significant aspects of this statutory scheme should be emphasized before passing to a discussion of the Act's practical effect. First, state power may be invoked against a proposed establishment or relocation *only* by the existing dealer or dealers who would otherwise be required to compete with the dealership to be established or relocated. Notice to the Board is not required unless a dealer

[12] Cal. Gov. Code § 11517 is made applicable to protest proceedings by Cal. Veh. Code § 3066(a).

davits and documentary exhibits submitted by the parties." 440 F. Supp. at 439. The experiences of appellees Orrin W. Fox Co. (Fox), Muller Chevrolet (Muller), and General Motors Corporation (General Motors) graphically illustrate the unreasonable and unconstitutional burden imposed by the Act on independent franchised dealers and manufacturers who wish to establish or relocate motor vehicle dealerships in California.

Fox and Muller are, and were at all relevant times, duly licensed by California as dealers. (A. 137-38, 143-44). General Motors is, and was at all relevant times, duly licensed as an automobile manufacturer. (A. 152-53.)

For many years Fox has been a franchised dealer for American Motors automobiles and GMC trucks in Pasadena, California. (A. 137-38.) In May 1975, Fox entered into a franchise agreement with General Motors for the establishment of a Buick dealership at Fox's existing place of business in Pasadena and made substantial commitments necessary to engage in that business. (A. 138-41.) Fox was to be a replacement for a Buick dealer who had terminated his franchise over a year earlier, leaving Pasadena without Buick representation for the first time in more than 40 years. Nonetheless, a Buick-Opel dealer in the city of Monrovia and another in the city of San Gabriel jointly filed protests with the Board, and appellees were thereafter automatically enjoined from establishing the dealership.[15]

[15] The charge by State Appellants that "[appellees failed] to comply with the notification requirements" with regard to the Fox franchise is both irrelevant and incorrect. Brief for State Appellants 10. Before entering into the franchise agreement with Fox, General Motors informed the Board by letter that it did not believe it was required to notify Buick-Opel dealers within the "relevant market area" in light of Fox's status as a successor franchisee rather than a new franchisee. The Board responded simply that General Motors "should be guided by the appropriate sections of the California Vehicle Code." Upon receipt of this non-advice, General Motors and Fox entered into the franchise agreement and Fox actually commenced sales. (A. 138-39.) This activity alerted competitors who filed protests. Fox ceased Buick sales immediately upon being advised that protests had been filed, and General Motors sent notices of the proposed enfranchisement of Fox to the Board and to dealers in the "relevant market area" in July 1975.

In July 1975, the Board noticed the protests for hearing. The hearing was initially set for August 1975, but it was delayed, primarily by a series of discovery proceedings commenced by the protesting dealers in state court, and was in fact not held until September 1976. 440 F. Supp. at 439. The Board ultimately found the protests to be without merit. But,

> "under the provisions of the Act, the protestors were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay."

Id. (A. 139-41).

The Muller facts are even more dramatic. In October 1973, Muller had taken over a long-established dealership for Chevrolet automobiles and trucks in an unincorporated area near La Canada, California. (A.

144.) The dealership facilities were antiquated, inadequate, and deteriorating physically. Muller wanted to relocate a short distance away, in La Canada itself, at larger and more modern facilities then occupied by a Volkswagen dealer. (A. 144-46.) After more than a year of complex and time-consuming negotiations, Muller finally concluded an agreement to lease real property and purchase related equipment in December 1975. In January 1976, General Motors gave notice of the proposed relocation. (A. 76, 146-47.) Chevrolet dealers located in the cities of Pasadena and Tujunga filed protests with the Board.

As was the case with the Fox franchise, the protests stated no grounds (A. 76-77), nor did the Board investigate on its own or afford General Motors or Muller an opportunity to be heard. Rather, the Board automatically and summarily enjoined the relocation pending resolution of the protest. (A. 78-81.) Subsequently it scheduled a hearing for June, more than four months after issuance of the injunction. The hearing was again delayed by discovery proceedings initiated by the protesting dealers, and was not held until August 1976. (A. 286.)

The hearing officer found that the protesting dealers had failed to establish "good cause" for a permanent injunction against the relocation, and the Board failed to act on the hearing officer's recommendation. (Grancell Affidavit of Sept. 17, 1976.) Under Cal. Veh. Code § 3067 the proposed relocation was deemed approved when the Board failed to act within 30 days. But, by then:

> "Muller [had been] advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon 'gave up' with respect to this litigation and is starting all over again in his attempt to find a new site for his business."

440 F. Supp. at 439-40 (A. 147-48, 287). While searching for new facilities, Muller has been required to continue his business in the same dilapidated and antiquated facilities, to his competitive disadvantage and to the disadvantage of the consuming public.

The Muller and Fox cases show how the Act encourages and permits existing dealers to delay substantially, or frustrate entirely, the entry of new competitive dealerships. But the expense, inconvenience, and delay already suffered by Fox and Muller are not the end of the story. If either attempts to relocate or add additional franchises in the future, Fox or Muller will again face the continuing threat that a competitor may delay or prevent the proposed action simply by filing an unsubstantiated protest with the Board. Similarly, General Motors will face the threat of such expense, inconvenience, and delay whenever it seeks to establish a new franchise or to cooperate in the relocation of an existing franchise.

3. Proceedings Below

The Fox and Muller incidents, and [illegible] convinced appellees of the unfairness and unconstitutionality of the establishment and relocation protest procedures, and of appellees' inability to avoid irreparable injury from pending and future Board proceedings. On April 13, 1976, appellees filed the instant action seeking declaratory and injunctive relief against State Appellants. (A. 1.)

Appellees asked the District Court to declare the establishment and relocation provisions unconstitutional, on their face and as applied to appellees, and to enjoin continued enforcement of the Act. Appellees sought a declaration, *inter alia,* that the challenged provisions violate the Due Process Clause of the Fourteenth Amendment by permitting private competitors to obtain temporary injunctions automatically—without any prior notice, hearing, or procedural safeguards to prevent abuse. Appellees' complaint also described the conflict between these statutory provisions and the Sherman Act, and the undue burden imposed by the California law on interstate commerce. (A. 14-19, 22-23.)

Dealer Association Appellants subsequently moved to intervene as defendants (Motion of June 25, 1976), asserting that the Act "was passed by the California Legislature, in part to protect the vital economic interests of [their] members." (Crow Affidavit of June 25, 1976, at 1.) Their motion was granted. (Order of July 19, 1976.)

A three-judge panel of the United States District Court for the Central District of California was convened pursuant to 28 U.S.C. §§ 2281 and 2284. (Order of Sept. 7, 1976.)

On June 7, 1976, appellees moved for partial summary judgment on the due process and Supremacy Clause challenges to the Act. (A. 104-06, 109-13.) The court held argument on September 20, 1976.

One year later, on September 14, 1977, the three-judge court issued its decision declaring the challenged portions of the Act unconstitutional and enjoining their implementation and enforcement. 440 F. Supp.

436 (C.D. Cal. 1977). The court unanimously held that the statutory procedures were "in gross violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 440. The District Court's final judgment was entered on October 18, 1977. (Ex. E to Juris. St. of State Appellants.)[18]

The three-judge court noted that under the decisions of this Court, the right to "liberty" protected under the Due Process Clause includes the freedom to "engage in any of the common occupations of life." 440 F. Supp. at 440. While certainly not unlimited or shielded from state regulation, such liberty rights may be restricted or abridged only in conformity with the constitutional guarantees of *procedural* due process. *Id.* Central to such due process guarantees, noted the court, is the opportunity for a meaningful hearing prior to the abridgment of one's protected interests. *Id.*

The challenged protest procedures, the court found, provide the affected parties with no such opportunity to be heard prior to abridgment of their protected interests. Rather, the procedures empower private

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[18] The complaint, as opposed to the Motion for Partial Summary Judgment, attacked provisions of the Act in addition to the establishment and relocation provisions. (A. 3-5.) These other provisions are not involved in the present appeals because they were not addressed in the Motion for Partial Summary Judgment. Dealer Association Appellants nonetheless assert that other provisions of the Act "would appear to have been gratuitously voided." Brief for Dealer Association Appellants 10. The District Court did initially enter a judgment invalidating the entire Act (Ex. B to Juris. St. of State Appellants), but it corrected its judgment to address only the establishment and relocation provisions. (Ex. E to Juris. St. of State Appellants.) Dealer Association Appellants are thus simply in error.

automobile dealers, on their own and without any governmental determination or inquiry, to cause the state automatically to enjoin others from relocating in new facilities or from establishing new dealerships by the mere filing of a simple protest. The court noted:

> "Little imagination is needed in order to visualize how appealing such a prospect might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probable success, irreparable injury if his protest is not granted, or a bond or any other undertaking."

Id. at 438-39. The unrestricted operation of such delegated power in the hands of private businesses, the court found, "could seriously hamper or even completely destroy" proposed competing operations. *Id.* at 438.

Although the District Court found it unnecessary to reach the Supremacy Clause questions, the court's findings and its description of the Act graphically illustrate the Act's anticompetitive character. The Act as thus characterized is plainly in conflict with the policy and purpose of the federal antitrust laws.

Finally, the three-judge court addressed the *Pullman* abstention issue raised by appellants. Noting that there was no state litigation pending that might "result in an adjudication that would deal with the constitutional problem here presented," and finding that the Act is "clearly unconstitutional, and . . . [without any] ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process," the three-judge court concluded that it need not and, indeed, could not abstain from adjudicating the federal constitutional issues presented. *Id.* at 441-42.

This Court noted probable jurisdiction on February 21, 1978. 98 S. Ct. 1230 (1978).

Subsequent to the decision below, several other courts have considered and invalidated state statutory provisions very similar in effect to those challenged here. *See* Brief for Dealer Association Appellants 11-12. In *General GMC Trucks, Inc.* v. *General Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194, *cert. denied,* 434 U.S. 996 (1977), the Supreme Court of Georgia held that Ga. Code Ann. § 84-6610(f)(10) was unconstitutional as an impermissible burden on interstate commerce. The United States District Court for the Eastern District of Virginia reached the same conclusion with respect to Va. Code § 46.1-547(d) in *American Motors Sales Corp.* v. *Division of Motor Vehicles,* 445 F. Supp. 902 (E.D. Va. 1978).

SUMMARY OF ARGUMENT

This is not the case suggested by appellants' briefs. Appellees did *not* contend in the Motion for Partial Summary Judgment and do *not* contend here (1) that establishment or relocation of an automobile franchise at a particular place cannot be permanently enjoined by the state for "good cause" following an adjudicatory hearing, (2) that the hearing required prior to issuance of a temporary injunction must be a plenary evidentiary hearing on the merits, or (3) that a prior hearing is required before business regulations of any type may be imposed by the state.

In the Motion for Partial Summary Judgment, appellees did not contest California's right to regulate establishments and relocations, nor even its right to enjoin an establishment or relocation permanently under § 3062(a) if "good cause" is established at the

§ 3066(a) hearing. Rather, appellees contended merely that the statutory procedures for automatic issuance of a temporary injunction upon the application of a competitor violate the Due Process and Supremacy Clauses. In other words, appellees did not challenge the state's authority to effect *some* regulation of establishments and relocations. They contended only that *when* the state undertakes to do so by creating a forum for the adjudication of disputes between competitors, the state's scheme must satisfy the requirements of the Due Process and Supremacy Clauses. *See, e.g., Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *Compare Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), *with Bates* v. *State Bar*, 433 U.S. 350 (1977).

Appellees did not seek a plenary evidentiary hearing on the merits before a temporary injunction issues. They sought only the appropriate preliminary hearing guaranteed by the Due Process and Supremacy Clauses, a hearing that will strip existing dealers of the unfettered power to invoke state power to exclude competitors for indeterminate but prolonged periods of time.

Dealer Association Appellants contend that affirmance will "jeopardize or negate thousands of state licensing and business regulation laws." Brief for Dealer Association Appellants 16. That simply is not so, because the Act does not establish a licensing or conventional business regulation scheme. Rather, it establishes an *adjudicatory* scheme for the resolution of privately initiated protests. Appellees' motion was firmly predicated on the adjudicatory nature of the Act, and affirmance will not affect any state laws that do not share its gross constitutional deficiencies.

Stripped of the misconceptions introduced by appellants, the case involves very narrow issues, and the holding below was limited to those issues. The three-judge court held that manufacturers and dealers have constitutionally protected interests in the right to establish and relocate dealerships and that the Act denies due process to manufacturers and dealers by completely failing to provide for a hearing prior to automatic issuance of a temporary injunction at the request of a competitor.

The three-judge court's due process analysis was clearly correct. Under the Act, an existing dealer can, without any state supervision, invoke state power in an adjudicatory proceeding to delay indefinitely the establishment or relocation of a dealership for the "same line-make" anywhere in a 314-square-mile area—an area larger than all except two cities in California. The establishment or relocation of a dealership involves substantial commitments to acquire property and capital financing. Severe financial loss results from delay, and in an extreme case a dealership might be destroyed. The Act's provisions for issuance of a temporary injunction without any prior hearing or other safeguard thus drastically affect the interests of manufacturers and their prospective and existing franchisees in pursuit of their occupations—"liberty" interests fundamental to the "pursuit of happiness" in our society and fully protected by the Fourteenth Amendment.

Manufacturers and their franchisees also have constitutionally protected "property" interests. They derive a state-created entitlement to establish or relocate franchises from their existing licenses or their ability to acquire licenses. Under state law, this entitle-

ment is revocable only for "good cause"—the hallmark of a constitutionally protected "property" interest. Similarly, manufacturers and franchisees have a federally created entitlement to compete in interstate commerce without predatory interference by private individuals. Finally, contractual relationships between dealers and manufacturers with respect to establishments and relocations create constitutionally protected "property" rights.

The most basic principle of due process is that some kind of hearing must precede any adjudicatory deprivation of constitutionally protected interests such as those existing here. Yet, although proposed establishments and relocations in California may be permanently enjoined solely through adjudicatory protest proceedings, and then only for "good cause," the Act provides for no hearing of any kind before the issuance of a temporary injunction of indefinite, but prolonged, duration. The complete absence of any such hearing is doubly offensive because the initiative for the temporary injunction comes *not* from a disinterested government official, but rather from a private, self-interested competitor, and the Board must issue the injunction automatically, with no questions asked, whenever such an existing dealer chooses to initiate proceedings. The absence of any prior hearing whatsoever in these circumstances is patently violative of due process, and the three-judge court correctly required that *some* appropriate procedure, to be designed by the state, be afforded.

The issues raised by appellees' Supremacy Clause claims are equally simple. The challenged provisions of the Act conflict with the federal antitrust laws, which impose a per se prohibition against horizontal market allocations, because the automatic temporary

injunction provisions give an existing dealer unfettered power to exclude horizontal competitors for the "same line-make" from a very significant geographical area for prolonged periods. The Act thus must fall under the Supremacy Clause. *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

Appellants' only defense is *Parker* v. *Brown*, 317 U.S. 341 (1943), but *Parker* is not applicable here. The *Parker* exemption applies to adjudicatory proceedings, if at all, only when a state body makes an independent determination that anticompetitive conduct must be permitted under the close supervision of the state. *Parker* does not apply when the state statute, as here, invests private competitors with totally unsupervised discretion to invoke state power in order to accomplish predatory anticompetitive objectives. *Compare Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), *and Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), *with Bates* v. *State Bar*, 433 U.S. 350 (1977). If the narrow exemption articulated in *Parker* is applicable at all, its requirements can be met with respect to issuance of a temporary injunction only if the Board affords manufacturers and franchisees some kind of prior hearing at which the Board or some other state official preliminarily evaluates the merits of the protest so that it is the Board, not the private competitor, which imposes an anticompetitive restraint.

Finally, the three-judge court properly refused to abstain. This Court's decision in *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), does not require abstention, because the Act clearly and specifically requires that the Board issue a temporary injunction automatically, without any prior hearing, upon the

filing of a protest. And the three judges below, all familiar with California law, expressly found that the Act was unambiguous and not susceptible to a state-law construction that would avoid the necessity for constitutional adjudication. The inappropriateness of abstention is underlined by appellants' complete failure here or below to *advocate* any saving state construction or to explain how the constitutional question might be avoided through state litigation.

Younger v. *Harris*, 401 U.S. 37 (1971), is equally inapplicable. No contention was made below by any party that the three-judge court should dismiss the suit in light of the then pending Fox and Muller administrative proceedings. In any event, the court did not restrain the Board's consideration of those protests, and they had been resolved favorably to appellees before the injunction herein was issued. Principles of comity hardly require dismissal now, when the policies underlying *Younger* were not previously frustrated and could not now be retroactively served. Moreover, dismissal would not have been proper even if the contention had been timely raised. Under California law appellees could not have effectively raised the constitutional issues in the Muller or Fox proceeding. And state court review of the administrative proceeding is not an adequate remedy. Because appellees prevailed on the merits before the Board, their constitutional challenges could not be raised in court. If appellees had lost before the Board on the merits, the irreparable injury caused by the temporary injunction could not have been remedied by state court review. Finally, regardless of any of the other reasons why *Younger* does not apply here, the multiplicity of protest proceedings and the financial hardship and irreparable loss attendant upon the issuance of temporary injunctions bring this case within the "exceptional circumstances" exception to *Younger*.

ARGUMENT

I. THE DUE PROCESS CLAUSE FORBIDS SUMMARY ADJUDICATORY DEPRIVATIONS OF AN INDIVIDUAL'S CONSTITUTIONALLY PROTECTED INTERESTS MERELY UPON THE UNSUPPORTED APPLICATION OF COMPETITORS.

The Act establishes an adjudicatory system, predicated upon "good cause," to resolve disputes between existing individual dealers and other individuals who propose to establish new dealerships for the "same line-make" or relocate such existing dealerships. This adjudicatory process can be initiated only by existing, self-interested dealers who are or would be actual or potential competitors of the individuals whose rights will be affected by a temporary or permanent injunction. As the Court has noted, the basic, and unquestionable, principle of due process is that the state must afford *some* kind of hearing before it interferes by adjudication with the conduct of a private individual at the request of another private individual. *See, e.g., Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).[17]

[17] These requirements of procedural due process are, of course, entirely separate from the requirements of substantive due process considered by the Court in such cases as *Exxon Corp.* v. *Governor of Maryland*, 46 U.S.L.W. 4662 (June 14, 1978). When economic legislation is challenged on substantive due process grounds, the contention is that a state may not regulate a certain subject at all or that the substantive provisions are unfair and arbitrary, not that the state must afford appropriate procedures if it chooses to regulate that subject only through adjudicatory proceedings initiated by private competitors. As noted already, appellees' contentions here are limited to the latter concern. *See supra* at 19-20.

The Act transgresses this basic requirement. In accordance with "the familiar two stage analysis" identified in *Ingraham* v. *Wright,* 430 U.S. 651, 672 (1977), Section A hereof first demonstrates that the Act affects vitally important "liberty" and "property" interests. Section B then turns to an assessment of the patent constitutional inadequacy of the Act's procedures.

A. The Temporary Injunction Provisions of the Act Drastically Affect Strong, Constitutionally Protected "Liberty" and "Property" Interests.

1. THE AUTOMATIC TEMPORARY INJUNCTION PROVISIONS AFFECT FUNDAMENTAL "LIBERTY" INTERESTS IN PURSUIT OF AN INDIVIDUAL'S OCCUPATION.

The three-judge court correctly held that automobile dealers and manufacturers have "liberty" interests in their establishment and relocation decisions:

> "As the Supreme Court has said, the right to the liberty proclaimed by [the Due Process Clause of the Fourteenth Amendment] '. . . denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' *Meyer* v. *Nebraska,* 262 U.S. 390, 399 . . . (1923). Certainly, the right to grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location to another are included within this protection. Of course, the right to do these things is not unlimited. Legitimate conflicting interests of other individuals and of the public as a whole often require that restrictions be imposed. The Fourteenth Amendment requires only that such restrictions be administered in accordance with the procedural safeguards that have been established over the years as constituting due process of law."

440 F. Supp. at 440.

The principal basis of State Appellants' contrary argument is that after this Court's decision in *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955), there is no longer any "liberty" interest in "the right of the individual . . . to engage in any of the common occupations of life." *See* Brief for State Appellants 22-24. This fallacious argument, however, requires no extended discussion, for the Court has continued to recognize the right identified in *Meyer* since *Williamson.* In *Greene* v. *McElroy,* 360 U.S. 474, 492 (1959), for example, the Court said:

> "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth [or Fourteenth] Amendment, *Dent* v. *West Virginia,* 129 U.S. 114; *Schware* v. *Board of Bar Examiners,* 353 U.S. 323; *Peters* v. *Hobby,* 349 U.S. 331, 352 (concurring opinion); *cf. Slochower* v. *Board of Education,* 350 U.S. 551; *Truax* v. *Raich,* 239 U.S. 33, 41; *Allgeyer* v. *Louisiana,* 165 U.S. 578, 589-90; *Powell* v. *Pennsylvania,* 127 U.S. 678, 684 . . . ."

See Board of Regents v. *Roth,* 408 U.S. 564, 572 (1972); *United States* v. *Robel,* 389 U.S. 258 (1967); *Willner* v. *Committee on Character,* 373 U.S. 96, 102 (1963).[18]

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[18] It is also argued that there is no "liberty" interest in pursuit of an occupation because such an interest is not specifically guaranteed by the Bill of Rights. Brief for State Appellants 22-23; Brief

The Court has also always recognized the fundamental importance of this right. Ours is still essentially a free enterprise economy, in which each individual's own efforts contribute importantly to the "pursuit of happiness." *E.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *Fuentes* v. *Shevin*, 407 U.S. 67, 90 (1972). The rights to labor and to hold the fruits of labor securely therefore have always been afforded substantial constitutional protection. *See, e.g., Greene* v. *McElroy*, 360 U.S. 474, 492 (1959) and cited cases; *Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972).[19] In particular, those rights must not be subjected to the arbitrary whims of competitors, as is allowed by the Act's temporary injunction provisions:

> "[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Yick Wo v. *Hopkins*, 118 U.S. 356, 370 (1886); *see Fuentes* v. *Shevin*, 407 U.S. 67, 93 (1972). *See also Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964).

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for Dealer Association Appellants 14, *citing Paul* v. *Davis*, 424 U.S. 693, 710-11 & n.5 (1976). *Paul* did not consider this question and could hardly have been intended to disapprove so casually the decisions cited in the preceding text. Moreover, it is clear from subsequent cases that a protected "liberty" interest can arise from the "'Nation's history and tradition.'" *E.g., Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). It is precisely in such sources that *Meyer* and other decisions have found the "liberty" interest in pursuit of an occupation.

[19] The strength of the individual's interest in liberty of enterprise is fully reflected in the federal antitrust laws. *See infra* at 33-34, 41-53.

State Appellants therefore can only hope to prevail by arguing that the interests of dealers in establishing or relocating dealerships at a particular site and the interests of manufacturers in such activities, each for any number of valid business reasons,[20] are outside the unquestioned "liberty" interest in pursuit of an occupation. *See* Brief for State Appellants 30. This simply cannot be true. If the interest of which an individual is deprived is not "liberty" or "property," due process is not required before either a temporary or a permanent deprivation. Thus, if establishment and relocation decisions were to be deemed completely outside the protection of the Fourteenth Amendment, the Act could also require issuance of a permanent injunction on the naked and capricious protest of a competing dealer—an unthinkable result. *See, e.g., Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), *quoted supra* at 28. *See also infra* at 38-39.

State Appellants attempt to support their position by arguing that the "liberty" interest in pursuit of an occupation is not implicated unless an individual is completely precluded from pursuing his occupation through denial of a license. Brief for State Appellants 28-30. This Court, however, has announced a far different test. In *Board of Regents* v. *Roth*, 408 U.S. 564, 574 (1972), the Court noted that this "liberty" interest is implicated whenever the state "foreclose[s] a range of opportunities." And the Court has found an individual's interest in a "specific job" in private enterprise and in admittance to practice accountancy before a specific federal tribunal to be constitutionally protected. *See Greene* v. *McElroy*, 360 U.S. 474, 492

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[20] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 54-55 & n.23 (1977). *See infra* at 30 n.21.

(1959); *Goldsmith* v. *Board of Tax Appeals,* 270 U.S. 117, 123 (1926). Several lower courts have held that a doctor's "liberty" interest includes his interest in admittance to staff privileges at a particular public hospital. *Shaw* v. *Hospital Authority,* 507 F.2d 625 (5th Cir. 1975); *Don* v. *Okmulgee Memorial Hospital,* 443 F.2d 234 (10th Cir. 1971).

At stake in *Greene, Goldsmith, Shaw,* and *Don* was the individual's interest in pursuing his occupation at a particular, limited place. These decisions thus establish that dealers and manufacturers have a "liberty" interest in establishing or relocating dealerships at the sites of their choosing, as the three-judge court held.[21] Yet the temporary injunction provisions give each existing dealer unfettered dominion over a "relevant market area" with an area of 314 square miles, sufficient to allow an existing dealer in the heart of all but two cities in California[22] to cause any proposed

[21] The right to market automobiles through sufficient numbers of appropriately located franchised dealers is important to a manufacturer's efforts to achieve marketing efficiencies and to meet its responsibilities to consumers, including responsibilities for product quality and product safety imposed by both federal and state law. *See Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 54-55 & n.23 (1977); Record 316-21, *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966); *cf.* 15 U.S.C. § 1391 *et seq.;* Cal. Civ. Code § 1792 *et seq.,* § 1793.2.

[22] According to the 1970 census, only two cities in California have an area of more than 314 square miles: San Diego (316.9) and Los Angeles (463.7). U.S. Dep't of Commerce, 1970 Census of Population, Characteristics of the Population, vol. I, pt. A, § 1, Table 31. Assuming that any other city in California is roughly circular and that an existing dealer has a central location, the Act would apply to any "establishment" or "relocation" of a "same line-make" franchise within the city because any proposed franchise would be within 10 miles of a centrally located dealer.

A "relevant market area" can easily contain hundreds of thousands of consumers, as illustrated by the Fox case. The "relevant market area" surrounding the Fox dealership includes a population of approximately 1,370,000, even though much of the "relevant market area" is included within the Angeles National Forest and thus is virtually uninhabited. This figure was derived by totalling the 1970 population in census tracts within 10 miles of Fox's place of business in Census Tract 4631.02. *See* U.S. Dep't of Commerce, 1970 Census of Population and Housing, Census Tracts, Los Angeles-Long Beach, Calif. SMSA, Vol. 1 (map and tables).

establishment or relocation in his city to be enjoined temporarily, without valid cause, no matter how responsibly the manufacturer and prospective dealer have acted and no matter how arbitrarily the injunctive power is exercised by a protesting dealer.[23] Clearly the Act interferes with the "liberty" interest in establishing or locating dealerships and "foreclose[s] a range of opportunities."

2. THE TEMPORARY INJUNCTION PROVISIONS AFFECT AN INDIVIDUAL'S "PROPERTY" INTERESTS, PARTICULARLY THE STATE-CREATED ENTITLEMENT TO LOCATE FRANCHISES FREELY.

The three-judge court also held that the challenged provisions deprive manufacturers and franchisees of "property" without due process. (Ex. E to Juris. St. of State Appellants.) The temporary injunction provisions affect three separate property interests: that arising from state licenses, that arising from the federal antitrust laws, and that arising from contractual arrangements between dealers and manufacturers.

[23] In some circumstances the Act would completely preclude a dealer from pursuing his occupation during the delay. For example, if a fire or condemnation forced a dealer to relocate, he would be completely unable to do business until final resolution of any protest instigated by a competitor. Moreover, a dealer's financial or other arrangements may be so disrupted by a protest as to cause him to go out of business.

A dealer or manufacturer must be licensed before conducting business in California. *See supra* at 10. When a license applicant meets the licensing criteria, which are completely separate from the Act, *see supra* at 10-11, he is entitled to be licensed, and his license is revocable only for cause. Cal. Veh. Code §§ 11705, 11705.2, 11705.4. These state licenses create a right to establish or locate franchises anywhere, *see supra* at 11, which can be permanently "altered or extinguished," *Paul* v. *Davis,* 424 U.S. 693, 711 (1976), only if a protesting dealer shows "good cause." *See supra* at 8. Because a license may be denied or an establishment or relocation prevented only for "cause," these state-created rights are within the "property" protected by the Due Process Clause. As the Court stated in *Memphis Light, Gas & Water Division* v. *Craft,* 98 S. Ct. 1554, 1561 (1978) (footnote omitted), "Because [a Tennessee utility] may terminate service only 'for cause,' [its customers] assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause." *See Dixon* v. *Love,* 431 U.S. 105 (1977); *Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Bell* v. *Burson,* 402 U.S. 535 (1971).

Dealer Association Appellants suggest that this "property" interest was terminated by the Act, and that establishment or relocation decisions now involve mere "business desires or expectations of future benefits." Brief for Dealer Association Appellants 12. In fact, however, as already noted, the Act does not affect licensing and specifies that an establishment or relocation may be permanently enjoined only if it is finally determined that there is "good cause for not permitting such dealership." Cal. Veh. Code §§ 3062

(a), 3063. Clearly, the Act left the state-created "property" interest intact, simply subjecting it to "alter[ation] or extinguish[ment]," and then only for "good cause." *Paul* v. *Davis,* 424 U.S. 693, 711 (1976)."[24] Thus, state law continues to create a constitutionally protected "property" interest.

Establishment and relocation decisions also involve a federally created "property" interest. Under the federal antitrust laws, there is a "freedom guaranteed each and every business no matter how small, . . . to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 610 (1972); *see City of Lafayette* v. *Louisiana Power & Light Co.,* 98 S. Ct. 1123, 1129 (1978). This statutorily created federal right may be abridged by state action in an adjudicatory or regulatory proceeding initiated by a competitor only if the requirements of *Parker* v. *Brown,* 317 U.S. 341 (1943), are met. As shown more fully in Part II, *infra,* the *Parker* exemption cannot be claimed when the state, upon the request of a competitor, automatically enforces discretionary anticompetitive acts taken by private individuals without independently inquiring whether in-

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[24] The Act attempts to authorize extinguishment of this "property" interest without constitutionally sufficient procedures, but this is irrelevant to the threshold question whether the entitlement exists. For once state law creates an entitlement, constitutionally adequate procedures must be provided before deprivation of the entitlement. *Compare Arnett* v. *Kennedy,* 416 U.S. 134, 164, 167 (Powell, J., concurring in part & concurring in the result), *id.* at 171, 177-79 (White, J., concurring in part & dissenting in part), *id.* at 206, 209-11 (Marshall, J., dissenting), *with id.* at 134, 151-54 (plurality opinion). The three separate opinions commanded the votes of six Justices.

terference with the freedom to compete is justified by "cause." Thus, federal law, like state law, creates a constitutionally protected "property" interest. *See* the cases cited in the preceding paragraph.

Finally, establishment and relocation decisions involve a contractual relationship under which dealer and manufacturer agree that a franchise shall be established or relocated at a particular place. The contracting parties are entitled to enjoy the fruits of their agreement unless there is "good cause" to prevent the proposed establishment or relocation permanently. Such contractual relationships create constitutionally protected "property." *See, e.g, Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Truax* v. *Raich,* 239 U.S. 33, 38 (1915); *cf. Greene* v. *McElroy,* 360 U.S. 474, 492 (1959). The state cannot, in an adjudicatory proceeding, deprive individuals of those interests without providing due process. *E.g., Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972).[25]

B. The Act Violates Due Process by Failing To Provide for a Hearing Before the Issuance of Temporary Injunctions That Interfere with Constitutionally Protected Interests.

Although it might have chosen otherwise, the state regulates establishments and relocations solely through

[25] State Appellants apparently contend that no protected "property" interest could arise by contract because the contracts "[include] and [incorporate] the Act's provisions affecting the contract's validity, construction, discharge and enforcement." Brief for State Appellants 37. If this were true, a government employee dischargeable only for "cause" could be discharged without a prior hearing, pursuant to a statute so providing, if his employment contract were entered after enactment of the statute. The Court has held to the contrary. *See supra* at 33 n.24.

adjudications initiated by self-interested private dealers. The constitutionality of the Act is to be evaluated on the basis of what the state has actually enacted, not on the basis of what it could have enacted. *E.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 515 (1964). Having chosen to establish such a system, the state is subject to the long-established requirement that some kind of hearing must precede any adjudicatory deprivation of interests protected by the Due Process Clause.

> "Before a person is deprived of a protected interest [by adjudication], he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'"[26]

Board of Regents v. *Roth,* 408 U.S. 564, 570 n.7 (1972); *see Bell* v. *Burson,* 402 U.S. 535, 541 (1971); *Mullane*

[26] Appellants do not, and could not, contend that protests filed by an existing dealer present an "extraordinary situation" justifying summary procedures. First, mere operation by the proposed dealer does not routinely threaten the public interest. The most dramatic proof of this is that the Board cannot interfere with a proposed establishment or relocation *sua sponte* but merely adjudicates any protest filed by a competitor. Moreover, no franchisor or proposed franchisee can do business in California unless he is licensed, Cal. Veh. Code § 11700, and the Department is fully authorized to inquire into an applicant's "character, honesty, integrity, and reputation" before issuing a license. *Id.* § 11704(a).

Second, the establishment and relocation of franchised dealerships is a normal competitive practice beneficial to the consuming public, the new dealers, and the manufacturer. *See infra* at 44 n.36. The Act recognizes this by assigning the burden of proof on "good cause" to the protestant. Cal. Veh. Code § 3066(b). In addition, Cal. Veh. Code §§ 11713.1 and 11713.2 proscribe manufacturer attempts to treat existing dealers unfairly. *See especially* Cal. Veh. Code § 11713.2(a), (i), (o), (p).

v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This principle applies to temporary, as well as final, deprivations of protected interests. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Morrissey* v. *Brewer*, 408 U.S. 471, 485-87 (1972).[27]

The Act fails to meet this standard, because the affected parties receive no hearing of any kind before they are deprived of the constitutionally protected interests described in Section A by an automatic temporary injunction. *See supra* at 6-7. Moreover, the Act totally fails to provide *any* of the procedural safeguards normally associated with deprivations of constitutionally protected rights in adjudicatory proceedings. The Act does not require that the franchisor and potential franchisee be notified of the grounds for the protest and allowed to contest them, orally or in writing, *prior* to issuance of the temporary injunction.[28] It does not require that the Board issue a tem-

[27] Appellees' motion and the three-judge court's decision rested both on the absence of a hearing before issuance of the temporary injunction and on the Act's failure to require a prompt post-issuance hearing on the merits. (A. 105.) Dealer Association Appellants erroneously suggest that appellees have abandoned the second contention. *See* Brief for Dealer Association Appellants 10. The remoteness in time of the final hearing remains relevant to the inadequacy of the pre-injunction procedures. *See infra* at 37. Moreover, when the state designs new procedures, it must take into account the period of delay preceding the final hearing. *See infra* at 39 n.33. Finally, if this Court were to disagree with the three-judge court's requirement for a pre-issuance hearing, the question whether a prompt post-issuance hearing is required would remain.

[28] *Compare, e.g., Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977), *and Mathews* v. *Eldridge*, 424 U.S. 319 (1976), *and Arnett* v. *Kennedy*, 416 U.S. 134 (1974), *with, e.g., Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *and Bell* v. *Burson*, 402 U.S. 535 (1971).

porary injunction ex parte only upon a showing of need and the posting of a bond.[29] Even assuming that a hearing need not precede a temporary injunction under the Act if a hearing follows promptly, the Act does not require the protestant to support an injunction in a prompt post-issuance hearing or even allow the enjoined parties to show why the injunction should be dissolved.[30] When a final deprivation of "liberty" or "property" is justified only for "cause" or "fault," at least some of the foregoing procedural safeguards must be provided in connection with a temporary or preliminary deprivation. *See, e.g., Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Bell* v. *Burson*, 402 U.S. 535 (1971).[31]

[29] *Compare Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), *with, e.g., North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). *See also Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (statutory provision for reimbursement of erroneously suspended disability benefits); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (statutory provision for back pay following erroneous suspension from employment).

[30] *Compare Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), *with Bell* v. *Burson*, 402 U.S. 535 (1971), *and Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

[31] In staying the judgment below, Mr. Justice Rehnquist noted that the state has an interest in the orderly resolution of protests. 98 S. Ct. 359, 363 (1977) (Chambers Opinion). The Board, however, merely sits as an adjudicatory tribunal. Consequently, the state interest is simply that protests among private competitors be properly resolved. If this interest suffices to deny all prior procedures in this case, it is difficult to imagine when procedures must ever precede a temporary deprivation of a constitutionally protected interest. If the Act's procedures are constitutional, may not a lawyer be summarily suspended from practice before a particular tribunal on the naked "protest" of a competitor, perhaps even an adversary, pending "orderly" resolution of the protest?

Preliminary procedural protections for the franchisor and franchisee are especially necessary because of the role played by the protesting dealer under the Act. In *Fuentes* v. *Shevin,* 407 U.S. 67, 93 (1972) (footnote omitted), the Court condemned statutes conferring similar unfettered power on private parties:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark."

See also Mitchell v. *W.T. Grant Co.,* 416 U.S. 600, 615-17 (1974); *Gibson* v. *Berryhill,* 411 U.S. 564, 578-79 (1973); *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886).

The same principle was applied in the Court's earlier decision in *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936). There the Court invalidated certain provisions of the Bituminous Coal Conservation Act of 1935 under which wage and hour agreements negotiated between employees and some individual coal producers became binding on other coal producers who were in no way involved in the negotiations. The Court emphasized that

> "in the very nature of things, one [private] person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."

Id. at 311. Similarly, the Court has held that a state may not require government officials to adopt, without independent review, a privately mandated course of action. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116, 121-22 (1928); *Eubank* v. *City of Richmond,* 226 U.S. 137, 143-44 (1912)."

Inherent in the concept of due process is a requirement of fundamental fairness. *Memphis Light, Gas & Water Division* v. *Craft,* 98 S. Ct. 1554, 1564 n.19 (1978). On their face, the challenged portions of the Act lack even a semblance of fairness, for they allow established dealers, who already enjoy the fruits of engaging in the retail automobile business, arbitrarily and without risk to their own pecuniary interests to interfere with the rights of others, who are equally qualified and deserving, to participate in those same economic fruits of business endeavor.

The three-judge court went no further than these basic and well-established principles. It required only that *some* procedure be developed where none now exists. It left California free to devise guarantees that will comply with due process.[22] No further inquiry

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[22] The principal question in *Carter* concerned the reach of congressional power under the Commerce Clause. The Court has long since repudiated *Carter*'s restrictive view of that power. *See Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (1948). However, the proposition for which *Carter* is relied on here, that state power may not be delegated to private individuals, has never been questioned. *See* 1 K. Davis, Administrative Law § 2.14 (1958); 2 C. Antieau, Modern Constitutional Law § 11:21, at 227 (1969); *cf. McGautha* v. *California,* 402 U.S. 183, 248, 272 n.21 (1971) (Brennan, J., dissenting).

[23] The hearing required is one "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950); *see Bell* v. *Burson,* 402 U.S. 535, 541-42 (1971). The "nature" of establishment and relocation proceedings requires

into the correctness of the judgment is necessary in this case. *See, e.g., Bell* v. *Burson,* 402 U.S. 535, 542-43 (1971). *See also Mathews* v. *Eldridge,* 424 U.S. 319, 333-34 (1976).[34]

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an inquiry into whether "good cause" exists to disallow the proposed establishment or relocation permanently. *Id.* Appellees recognize that the required hearing is a preliminary one; however, the care with which the predeprivation hearing is conducted must reflect the prolonged period during which the temporary injunction will be in effect. *See, e.g., id.; North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601, 607 (1975); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

[34] State Appellants advance an elaborate argument against affording any prior procedures whatsoever, based on *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976). Their heavy reliance on *Mathews* is completely misplaced because the question there was whether due process required that a full-dress evidentiary hearing precede suspension of social security disability benefits. The Court held that no such evidentiary hearing was required because, by statute: (1) Termination proceedings were initiated and conducted by responsible public officials. *Id.* at 349. (2) The public officials' decisions were based upon objective, reliable data as to the merits of the termination. *Id.* at 343-45. (3) The benefits recipient was afforded a pre-suspension opportunity to assert his claim, to submit evidence and arguments, and to challenge the correctness of the agency's tentative conclusions. *Id.* at 345-46, 349. (4) A recipient whose benefits were erroneously suspended was made whole if the suspension was subsequently reversed. *Id.* at 340. Here appellees did not seek, and the three-judge court did not require, a full-dress evidentiary hearing, and none of the lesser procedural safeguards involved in *Mathews* is afforded under the Act here challenged.

In any event, the balancing process identified in *Mathews* fully supports the judgment below that *some* prior hearing must be provided. The "liberty" and "property" interests involved in establishment and relocation decisions have always been recognized as important ones, *see supra* at 26-34, and a temporary injunction affects them dramatically. An erroneous deprivation of such interests through issuance of a temporary injunction is highly likely because the Act confers unfettered power on self-interested private

II. THE SUPREMACY CLAUSE ALSO FORBIDS ISSUANCE OF AN AUTOMATIC TEMPORARY INJUNCTION MERELY UPON APPLICATION OF AN INDIVIDUAL'S COMPETITORS.

The Act's grant to private competitors of completely unaccountable power to cause issuance of automatic temporary injunctions is invalid under the Supremacy Clause, as well as the Due Process Clause. Section A first shows that the anticompetitive features of the Act conflict with the federal antitrust laws. Section B then shows that the "state action" doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), does not immunize the Supremacy Clause violation described in Section A. We reemphasize that appellees' conten-

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parties to compel issuance of temporary injunctions. *See, e.g., Fuentes* v. *Shevin,* 407 U.S. 67, 93 (1972); *Bell* v. *Burson,* 402 U.S. 535, 541-42 (1971); *supra* at 10 n.13. These factors clearly establish the need for *some* kind of pre-injunction hearing, and the state has no countervailing interests allowing complete denial of any type of hearing. The Board, as noted already, cannot investigate or protest an establishment or relocation *sua sponte,* but merely adjudicates protests filed by self-interested dealers. This indicates clearly that the state itself views its substantive interests in such disputes as far less important than the interests it protects in its own regulatory programs. *See, e.g., Fuentes* v. *Shevin,* 407 U.S. 67, 93 & n.30 (1972). State Appellants contend that the state's interest in avoiding fiscal and administrative burdens justifies the state's complete abdication of power to self-interested competitors. Brief for State Appellants 41-44. These concerns never justify denial of all prior procedures. *See, e.g., Mathews* v. *Eldridge,* 424 U.S. 319, 348 (1976); *cf. Marshall* v. *Barlow's, Inc.,* 98 S. Ct. 1816, 1822-26 (1978). When the state affords *some* procedures, it may be heard to argue that *additional* procedures would be unduly burdensome.

When all the factors relevant under *Mathews* are taken into account, it is evident that the three-judge court correctly required that some kind of hearing precede the issuance of a temporary injunction. Indeed, the court could well have gone further and prescribed requirements similar to those which govern the issuance of a temporary injunction in federal court. *See* Fed. R. Civ. P. 65.

tion here is directed solely at the complete absence of procedures before issuance of the temporary injunction; thus, there is no need to consider the state's power to enter a permanent injunction after a hearing and a finding of "good cause." *See supra* at 19-20.

A. Temporary Injunctions Precluding the Entry of New Competition, Obtained with No State Review and Entered Only at the Request of Existing Dealers, Are Contrary to the Federal Antitrust Laws.

Horizontal combinations and conspiracies to restrain trade and allocate markets are so patently pernicious that they have long been held to constitute per se violations of the federal antitrust laws, including the Sherman Act, and participants in such activities are subject to liability for damages. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963). And *all* horizontal territorial restraints and market allocations are, if imposed by private persons, contrary to the central policy of the antitrust laws, whether or not those devices technically violate the Sherman Act and thereby create liability for damages. Thus, any state law allowing private persons to impose such trade restraints is invalid under the Supremacy Clause. *See Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Rice* v. *Alcoholic Beverage Control Appeals Board*, Nos. S.F. 23631, 23632 (Cal. May 30, 1978); *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); 1 P. Areeda & D. Turner, Antitrust Law § 209, at 61-62 (1978).[35]

[35] The Court recently noted that "an adverse effect on competition [is not], *in and of itself*, enough to render a state statute invalid" by reason of a conflict with "the central policy of the Sherman Act." *Exxon Corp.* v. *Governor of Maryland*, 46 U.S.L.W. 4662, 4666 (June 14, 1978) (emphasis added). Appellees make no such contention. They contend that the temporary injunction provisions conflict with the "central policy of the Sherman Act" not solely because those provisions adversely affect competition, but rather because the adverse effect on competition flows from the unsupervised use of state power by private individuals.

Such principles were early applied in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). When *Schwegmann* was decided, the Miller-Tydings Act, 50 Stat. 693, allowed certain contracts for resale price maintenance as a matter of federal law, although other price fixing was per se violative of the Sherman Act. 341 U.S. at 386. A Louisiana statute permitted, but did not compel, a distributor (1) to contract with retailers in Louisiana to establish minimum price schedules (which was permissible under federal law) and, further, (2) to enforce those schedules against all nonsigning retailers in the state who had knowledge of such contracts. Since the state did not regulate the terms of the minimum price contracts in any way, the Louisiana statute actually conferred unsupervised power on private persons to fix prices for nonsigning retailers.

A liquor distributor, acting pursuant to the Louisiana statute, sought to enjoin a nonsigning liquor retailer from selling below the contractually established price. The distributor's contracts with other retailers were legal under then existing state and federal law, and the enforceability of the price schedules against nonsigners arose from Louisiana law, not the actions of the distributor. Nonetheless, without inquiry into whether the distributor had violated the antitrust

laws, the Court held that the Miller-Tydings Act did not authorize enforcement of minimum price schedules against nonsigners and that, under the Supremacy Clause, Louisiana could not empower the distributor, a private person, to fix prices. *See* 1 P. Areeda & D. Turner, Antitrust Law § 209 (1978). The Court noted that "[t]he fact that a state authorizes the price fixing [by private parties] does not, of course, give immunity to the scheme, absent approval by Congress." 341 U.S. at 386.[36]

A similar result was reached recently by the Supreme Court of California in *Rice* v. *Alcoholic Beverage Control Appeals Board,* Nos. S.F. 23631, 23632 (May 30, 1978). There the question was whether the Sherman Act preempted a California statute (1) requiring manufacturers of brand name liquors to post a minimum price schedule for their products with the Department of Alcoholic Beverage Control and (2) requiring retail dealers to adhere to those minimum prices. The Department of Alcoholic Beverage Control exercised no power of review whatsoever over the posted prices.

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[36] It is clear that Congress intends the antitrust laws to apply fully to automobile franchising practices. In enacting the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225, Congress provided that the legislation did not "repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States." *Id.* § 1224. And the report by the House Committee on the Judiciary emphasized:

> "[T]he bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objective of this legislation.*"

House Comm. on the Judiciary, Report on Automobile Dealer Franchises, H.R. Rep. No. 2850, 84th Cong., 2d Sess. 9-10 (1956) (emphasis added).

Administrative proceedings were initiated under the California statute against a retailer for selling below the price schedule, and the retailer challenged enforcement of the statute under the Supremacy Clause. The Supreme Court of California framed its inquiry carefully, indicating clearly that the question was whether the California statute was invalid under the Supremacy Clause, not whether anyone acting under the statute was liable for violating the Sherman Act. Slip op. at 10, 23, 33, 42, 47. Relying on *Schwegmann,* the court then held that the statute was preempted because it impermissibly allowed private persons to fix prices without state supervision.

The significance of *Schwegmann* and *Rice* is clear. In each case, the state purported to allow or require private persons to bring about a result clearly inconsistent with the federal antitrust laws. In each case, the decision simply by-passed the question whether the private persons were liable for damages and looked instead at the question whether the state law conflicted with the federal antitrust laws. *Schwegmann* and *Rice* thus demonstrate that federal antitrust policy may not be subverted by state legislation that authorizes, or even compels, private parties to undertake unsupervised anticompetitive activities.

The establishment and relocation protest provisions under consideration in this case present just the situation addressed in *Schwegmann* and *Rice,* for the temporary injunction provisions authorize private persons to undertake unsupervised anticompetitive activities. As has been shown, the challenged portions of the Act confer unrestrained power on private persons, acting alone or in concert, to invoke state power to preserve their position in the marketplace for ex-

tended periods of time by arbitrarily precluding the entry or relocation of horizontal competitors.[37] These results flow automatically from the discretionary acts of private persons who choose to protest—and not just any person, but the very one or more private persons least likely to favor competition from a new or relocated dealer and most likely to benefit from the erection of artificial barriers against new market entry.

The results encouraged and permitted by the Act could not conflict more clearly with the policies of the federal antitrust laws against horizontal territorial restraints and market allocations. *See, e.g., United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).[38]

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[37] As noted above, the temporary injunction provisions empower protesting dealers unilaterally to exclude new horizontal competitors or to prevent existing competitors from relocating in a 314-square-mile area—an area larger than any city in California except San Diego (316.9) or Los Angeles (463.7), and which often includes hundreds of thousands or millions of consumers. *See supra* at 30 n.22. Even though a potential new entrant or an existing competitor seeking to relocate may ultimately enter the market after final resolution of a protest, the unilaterally obtained prehearing injunction and the attendant delay, uncertainty, and expense have an obvious chilling effect upon new competitive entry. Indeed, in some cases the protest provisions may prevent entry or relocation altogether.

[38] The conflict is made crystal clear by *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). Whenever Holiday Inns received a franchise application, it notified at least the three Holiday Inn franchisees nearest to the site proposed for the new franchise. When the establishment of a franchise in Elizabeth, N.J., was opposed, Holiday Inns treated the protests as an unreviewable "veto." The Court held that Holiday Inns' conduct with regard to the proposed Elizabeth franchise was a per se violation of the Sherman Act.

> "By thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the . . . market, [defendant] enabled its franchisees already in the . . . area to divide that market between themselves, thus precluding further intrabrand competition. Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act."

Id. at 1242. The conduct in Holiday Inns not only violated the Sherman Act but also—obviously—conflicted with the policy of the Sherman Act. Implementation of the establishment and relocation protest provisions has an identical result, except that the Act empowers private dealers to force the Board to rubber stamp their "vetoes" by automatically issuing a temporary injunction.

Indeed, the Attorney General of California opposed the challenged provisions of the Act on this very ground when they were before the California legislature, explaining:

> "Assembly Bill 225 . . . has an apparent anti-competitive effect on the new car market. . . .
>
> "The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition. The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law.
>
> "Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co.* v. *United States*, 372 U.S. 253 (1963)."

Letter of August 3, 1973 from Attorney General Evelle Younger of the State of California to Assemblyman J.A. Gonsalves of the California State Assembly. (A. 269-70.)[39] As in *Schwegmann* and *Rice*, therefore, the Act is invalid under the Supremacy Clause.

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[39] State Appellants have previously tried to explain away the Attorney General's letter on the ground that the burden of proof in establishment and relocation cases was subsequently shifted from the manufacturer and entering dealer to the protesting dealer. (Defendants' Memorandum of Sept. 21, 1976, re Letter of Califor-

B. The Conflict with the Antitrust Laws Is Not Permitted Under *Parker* v. *Brown* Because the Board Makes No Independent Judgment of the Necessity for the Anticompetitive Action.

Dealer Association Appellants contend that the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), immunizes the establishment and relocation provisions from challenge under the Supremacy Clause. Brief for Dealer Association Appellants 19-23. As already suggested, however, the Court has never extended *Parker* so broadly as to allow a state agency to issue temporary injunctions automatically at the behest of a competitor (*i.e.*, without state supervision).

This Court has upheld a *Parker* "state action" defense only in *Parker* itself and *Bates* v. *State Bar*, 433 U.S. 350 (1977). In *Parker* the Court reversed an injunction against enforcement of the California Agricultural Prorate Act, pursuant to which the state restrained competition in the marketing of raisins. Private individuals played a significant role in the proposal, formulation, and final adoption of a marketing plan. 317 U.S. at 346-47, 352. But no competitive restraints were imposed until after elaborate state review. Affected parties could be heard in opposition to a proposed plan, and two separate determinations were required by state officials, independent of the farming industry, that a proposed plan met the objectives and requirements of the Agricultural Prorate Act. *Id.* at 346-47. The Court's description of the elaborate statutory procedures is reproduced in the margin.[40]

nia Attorney General.) But if the Act as a whole would have been unconstitutional if the enjoined parties bore the burden of proof, the temporary injunction provisions are unconstitutional a fortiori because the Act requires automatic issuance of a temporary injunction *whenever* a protest is filed, without regard to such "niceties" as burdens of proof.

In *Bates* v. *State Bar*, 433 U.S. 350, 362 (1977), the Court rejected the contention that the Supremacy Clause invalidated a rule of the Supreme Court of Arizona forbidding attorney advertising.

> "The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. Our concern

[40] "Upon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone (§ 8), and after a public hearing (§ 9), and after making prescribed economic findings (§ 10) showing that the institution of a program for the proposed zone will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers, the Commission is authorized to grant the petition. The Director, with the approval of the Commission, is then required to select a program committee from among nominees chosen by the qualified producers within the zone, to which he may add not more than two handlers or packers who receive the regulated commodity from producers for marketing. §§ 11, 14, 15.

"The program committee is required (§ 15) to formulate a proration marketing program for the commodity produced in the zone, which the Commission is authorized to approve after a public hearing and a 'finding that the program is reasonably calculated to carry out the objectives of the Act.' The Commission may, if so advised, modify the program and approve it as modified. If the proposed program, as approved by the Commission, is consented to by 65 per cent in number of producers in the zone owning 51 per cent of the acreage devoted to production of the regulated crop, the Director is required to declare the program instituted. § 16." 317 U.S. at 346-47.

that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active."

Thus, while many controversies have raged about *Parker*, it requires at a minimum that a state's imposition of an anticompetitive restraint be a responsible act of government. *Compare Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790-92 (1975). When the state regulates on a case-by-case basis at the initiative of private parties, it must provide prior procedures, as it did in *Parker*, if it is to act responsibly.[41] If, as here, procedures are absent in such circumstances, private individuals are allowed to "masquerad[e]" as the state, *Asheville Tobacco Board* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959), a result never countenanced by this Court. *See Goldfarb* v. *Virginia State Bar*, 421

[41] The *Parker* requirement for adequate procedures has been stressed by two noted commentators: When the state regulates, at the initiative of private parties, on a case-by-case basis, *Parker* requires "statutory approval procedures designed (1) to accord opponents the opportunity to present facts and arguments against the challenged act, (2) to assure conscious consideration by those particular state officials charged with the power and responsibility for approval, and (3) to allow judicial review of the agency record." 1 P. Areeda & D. Turner, Antitrust Law § 213f, at 78-79 (1978). This requirement is especially clear after *Bates*. The anticompetitive restraint there was a general policy embodied in a self-executing rule, yet the Court stressed that sanctions were actually applied only in proceedings in which the policy was constantly reevaluated. 433 U.S. at 362. If procedural guarantees are important in that context, they must be required a fortiori when the state regulates only through adjudications initiated by private parties.

U.S. 773, 791-92 (1975); *Gibson* v. *Berryhill*, 411 U.S. 564, 578-79 (1973)."

These principles were applied in *Woods Exploration & Producing Co.* v. *Aluminum Co.*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). There the holders of a small part of a gas field brought an antitrust action against the holders of the remainder of the field, alleging that the latter had conspired to restrain trade in, and to monopolize, production in the field. The large holders had made certain misrepresentations to the Texas Railroad Commission, which regulated production in the field, causing it to set production quotas that were detrimental to the small producers. The defendants invoked *Parker*, but the court held that *Parker* was not applicable because the defendants' misrepresentations rendered "meaningful" state action impossible:

> "[In light of the misrepresentations] [t]here was . . . no opportunity for meaningful supervision or verification. Because of the amount and character of [production quota petitions], the Railroad Commission of necessity must rely on the truthfulness of the gas producers. Such facts are usually within the exclusive control of those producers, so the final order of the Commission often must accept the [proposed production quota] at face value. Hence, defendants' conduct here can in no way be said to

[42] In fact, the recent cases of this Court have limited *Parker* to cases where the anticompetitive conduct is compelled by the statute or the acts of the state official. *Compare Bates* v. *State Bar*, 433 U.S. 350 (1977), *with Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), *and Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). Since the Board is merely given the authority to approve anticompetitive restraints sought by a private party, *Parker* might not apply even after the Board gave such approval. This question, however, need not be reached here. *See supra* at 19-20.

have become merged with the action of the state since the Commission neither was the real decision maker nor would have intended its order to be based on false facts."

Id. at 1295. Here the Board, to whom no facts must be provided, is no more—and perhaps less—"the real decision maker."

The same principles were also applied in *Rice* v. *Alcoholic Beverage Control Appeals Board,* Nos. S.F. 23631, 23632 (Cal. May 30, 1978), discussed above, where the Supreme Court of California emphatically rejected the contention that *Parker* immunized the state statute described *supra* at 44:

> "Neither *Parker* nor *Bates,* the two cases which found exemptions from the Sherman Act on the ground of state action, involved private conduct the substance of which was totally unconfined by state regulation.
>
> ". . . .
>
> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy. Thus, in our view, we would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold, as the department urges, that this scheme is immune from the Sherman Act."

Slip op. at 20-22. *Rice* is particularly persuasive here because it represents an articulation by California's highest court of what California believes is necessary for anticompetitive statutes to survive attack under the Supremacy Clause.

We have shown, then, that the power conferred on the protesting dealers conflicts with the federal antitrust laws and that *Parker* is not applicable. Because of this unimmunized conflict, the establishment and relocation provisions violate the Supremacy Clause. As the Court explained in *Perez* v. *Campbell,* 402 U.S. 637, 649 (1971):

> "As early as *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), Chief Justice Marshall stated the governing principle—that 'acts of the State Legislatures . . . [which] *interfere with,* or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid under the Supremacy Clause. *Id.,* at 211 (emphasis added). . . . '[i]n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[43]

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[43] The temporary injunction provisions of the Act also must fall because they violate the Commerce Clause. *See supra* at 3. A state law imposing a burden on interstate commerce is permissible only if it effectuates a legitimate local purpose and, even then, only if it does not burden commerce excessively and if no less burdensome means of promoting the same local purpose exists. *Great Atlantic & Pacific Tea Co.* v. *Cottrell,* 424 U.S. 366, 371-72 (1976).

The initial inquiry, of course, is whether the Act affects interstate commerce. General Motors sells new motor vehicles, parts, and accessories to franchised dealers, including Fox and Muller, in interstate commerce. The relationship between an out-of-state manufacturer and in-state purchasers to whom he sells for resale is in interstate commerce. *See, e.g., Missouri* v. *Kansas Natural Gas Co.,*

III. THE THREE-JUDGE COURT PROPERLY REFUSED TO ABSTAIN.

The three-judge court denied State Appellants' motion to abstain, which was based solely on the doctrine of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496

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265 U.S. 298, 306-09 (1924). Every temporary injunction against the establishment or relocation of a franchise therefore affects the flow of interstate commerce by delaying the opening of a new channel of interstate commerce and by delaying the sale of new motor vehicles, parts, and accessories at certain locations for indefinite periods. *American Motors Sales Corp.* v. *Division of Motor Vehicles*, 445 F. Supp. 902, 905 (E.D. Va. 1978); *General GMC Trucks, Inc.* v. *General Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194, *cert. denied*, 434 U.S. 996 (1977); *see H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 538-41 (1949).

The temporary injunction provisions therefore may be sustained only if they advance a legitimate purpose and do so without unnecessarily burdening interstate commerce. *See supra.* State Appellants identify two allegedly legitimate local purposes for the establishment and relocation provisions in general: (1) the protection of dealers from undue control by manufacturers and (2) the protection of consumers from the inadequate service that might result if there is "too much" competition in a "relevant market area." *See* Brief for State Appellants 41-42. The same state interests were asserted to justify a very similar state statute, *see* Brief for Dealer Association Appellants 11, in *American Motors Sales Corp.* v. *Division of Motor Vehicles*, 445 F. Supp. 902 (E.D. Va. 1978). However, in a carefully reasoned opinion, the court found that the Commerce Clause was violated by a *permanent* injunction, issued after a hearing, under such a statute.

The *American Motors* court ruled that the state's first interest, in protection of dealers from actions deliberately intended to injure them, is a legitimate local interest, but that the statutory provisions swept too broadly, because establishment of a franchise could be prevented even if the manufacturer acted in good faith. *Id.* at 907-11, *citing Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976). The Act likewise has no bad faith requirement for a permanent injunction, *see* Cal. Veh. Code § 3062(a); moreover, California has many other protections against actions alleged to

(1941)—notwithstanding State Appellants' present reliance on the doctrine of *Younger* v. *Harris*, 401

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have been taken by manufacturers in bad faith. *See supra* at 5 n.3, 35 n.26.

The state's second interest, in restriction of "destructive" competition among automobile dealerships, was held to be an impermissible local purpose. 445 F. Supp. at 905-07, *citing H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949); *Buck* v. *Kuykendall*, 267 U.S. 307 (1925). *See also City of Philadelphia* v. *New Jersey*, 46 U.S.L.W. 4801, 4803 (U.S. June 23, 1978). When they affect interstate commerce, state attempts to restrain "destructive" competition are impermissible unless the problem is of a "local character," which "because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." *Parker* v. *Brown*, 317 U.S. 341, 362-63 (1943). By no stretch of the imagination do the problems allegedly addressed by the Act fit the description in *Parker*. Congress has already addressed the "problem" of establishment and relocation decisions, indicating unequivocally that it did not want to prevent good-faith appointments of additional franchises. *See supra* at 44 n.36. Moreover, the "problems" of franchise establishment and relocation are not of peculiarly local concern. *See* House Comm. on the Judiciary, Report on Automobile Dealer Franchises, H.R. Rep. No. 2850, 84th Cong., 2d Sess. 3 (1956) ("collectively the automobile-dealer group is of great importance to the [national] economy"). Any problems caused by "destructive" competition in this nationwide industry are therefore problems to be addressed by Congress. *See, e.g., Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924). Moreover, even if state restriction of competition to protect consumer interests were permissible, the Act again sweeps too broadly because the state's interest could be served by direct prohibitions against manufacturer practices threatening consumer interests. *See supra* at 5 n.3, 35 n.26.

These considerations would fully support a judgment that the permanent injunction provisions of the Act violate the Commerce Clause. The automatic temporary injunction provisions therefore are a fortiori unconstitutional. They may be invoked by private competitors without any state inquiry into whether legitimate state interests are at stake. They therefore unquestionably sweep too broadly because an appropriate preliminary hearing before issuance of the temporary injunction would fully protect whatever valid interests the state has.

U.S. 37 (1971). (A. 86-98.)" The court held that "there is no ambiguity [in the Act] that could be resolved [under *Pullman*] in such manner as to harmonize [the Act] with the requirements of due process." 440 F. Supp. at 442.

A. Pullman Abstention Is Completely Unwarranted in Light of the Clarity of the Act.

Pullman abstention is a departure from the ordinary obligation of federal courts to resolve federal claims properly before them, *see, e.g., Cohens* v. *Virginia,* 6 Wheat. 264, 404 (1821), a departure reserved for "special circumstances." *See, e.g., Zwickler* v. *Koota,* 389 U.S. 241, 248 (1967). The "special circumstances" justifying *Pullman* abstention arise when constitutional adjudication could be avoided by state resolution of an "unsettled" question of state law. *Harris County Commissioners Court* v. *Moore,* 420 U.S. 77, 83 (1975). State law is "unsettled" only if state construction would be "likely" to avoid or modify the constitutional question. *See id.* There is no need to abstain for an "unlikely" state ruling, *see, e.g., City of Chicago* v. *Atchison, T. & S.F.R.,* 357 U.S. 77, 84 (1958), or a ruling that would not " 'materially change the nature of the problem.' " *Bellotti* v. *Baird,* 428 U.S. 132, 147 (1976).

Under these standards, abstention was clearly inappropriate here. On the one hand, the Act specifically and unambiguously requires proposed establishments and relocations to be enjoined automatically

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[44] State Appellants' motion erroneously sought dismissal of appellees' suit, rather than a stay of proceedings, on *Pullman* grounds. *See, e.g., Zwickler* v. *Koota,* 389 U.S. 241, 244 n.4 (1967).

upon the filing of protest, without any prior hearing. A statutory requirement of prior procedures is not only not "likely," it would be impossible to read it into the Act, as three judges familiar with California law specifically found. On the other hand, no other possible construction of the Act would be "material" to appellees' claim that the Due Process and Supremacy Clauses forbid issuance of a temporary injunction without any prior procedures.

The clearest proof of the inappropriateness of abstention is the insubstantiality of the grounds for abstention advanced by State Appellants. Although their argument is difficult to parse, they appear to advance three grounds for abstention: (1) Even though the state statute does not provide for it, a state court *might* require a pre-issuance or prompt post-issuance hearing as a matter of state law. (2) A state court *might* construe § 3062(a) to require the franchisor to give notice at some very early point in the establishment or relocation process. (3) Proceedings are pending in which a state court *might* invalidate the Act on state law grounds. Brief for State Appellants 62-69.

We emphasize initially that State Appellants merely suggest that these things *might* happen. They do not purport to advocate any of these allegedly possible state-law holdings. *Compare Bellotti* v. *Baird,* 428 U.S. 132, 143-46 (1976); *Carey* v. *Sugar,* 425 U.S. 73, 79 (1976). Nor do they show why the state courts might reach them. *Compare Harris County Commissioners Court* v. *Moore,* 420 U.S. 77, 86-87 (1975); *Lake Carriers' Association* v. *MacMullan,* 426 U.S. 498, 511-12 (1972). These circumstances, by themselves, warrant a healthy skepticism as to whether

abstention is appropriate and certainly do not support the argument that the three-judge court abused its discretion by refusing to abstain. *Cf. City of Chicago* v. *Atchison, T.&S.F.R.*, 357 U.S. 77, 84 (1958).

1. California Courts Would Not Avoid the Necessity for Constitutional Litigation by Requiring a Pre-Injunction Hearing.

State Appellants' first contention is that a state court *might* require a pre-issuance or prompt post-issuance hearing as a matter of state law, even though the language of the Act does not so provide. In support, they cite *Endler* v. *Schutzbank,* 68 Cal. 2d 162, 436 P.2d 297, 65 Cal. Rptr. 297 (1968), and *Rios* v. *Cozens,* 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972), *vacated and remanded,* 410 U.S. 425, *reinstated,* 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973). *Endler,* however, involved no issue of state law concerning the right to a hearing. The court there held that the plaintiff, a licensed financial broker, stated a cause of action for denial of federal due process rights by alleging that the State Commissioner of Corporations had barred him from employment in brokerage houses without affording him an opportunity to rebut allegations of dishonesty. 68 Cal. 2d at 169-70, 436 P.2d at 302-03, 65 Cal. Rptr. at 302-03.[45] Similarly, in *Rios,* the court relied on the Due Process Clause of the Fourteenth Amendment

[45] The Court went on to note that *if* plaintiff proved such a denial of federal constitutional rights, the Commissioner of Corporations had statutory authority under sections of the California Financial Code—wholly inapplicable to the Vehicle Code involved here—to provide the hearing to which plaintiff was entitled under the Fourteenth Amendment. 68 Cal. 2d at 182 n.16, 436 P.2d at 311 n.16, 65 Cal. Rptr. at 311 n.16.

and on the parallel provision of the California Constitution, Art. I, § 13, to hold that an uninsured motorist's license may not be suspended after an accident unless the motorist is first given an oral hearing.[46] Thus, the only possibly relevant state law is Art. I, § 13, and abstention is not required where a state law challenge would rest on a state constitutional provision parallel to the Fourteenth Amendment. *See Examining Board* v. *Otero,* 426 U.S. 572, 597-98 (1976); *Harris County Commissioners Court* v. *Moore,* 420 U.S. 77, 84 n.8 (1975); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971). Moreover, in neither *Endler* nor *Rios* was there an explicit statutory requirement that the government agency act automatically upon the receipt of a complaint from a private person.

2. A Statutory Requirement of Early Notice, Even If Imposed, Would Not Materially Alter This Case.

State Appellants' second contention is that § 3062 (a) is ambiguous concerning when notice of a proposed establishment or relocation must be given. A state court therefore *might* require notice to be given very early during the franchisor's decisionmaking process, "modify[ing] the federal claim, and thus render[ing] abstention under *Pullman* both appropriate and necessary." Brief for State Appellants 69.

State Appellants themselves concede, however, that such a construction is not "likely," noting that early

[46] Since an uninsured motorist was already entitled to make a written submission, the precise question in *Rios* was not whether some kind of hearing was required but whether a "hearing" based solely on written submissions was constitutionally sufficient.

notice is not required under the plain language of the "unconstrued" Act. Brief for State Appellants 37. More importantly, such a construction would not "materially" alter this case. State Appellants merely urge that this construction would make the practical impact of the Act "somewhat" less burdensome. Brief for State Appellants 68. As the three-judge court explained, however, the Act would impermissibly affect manufacturers and franchisees even if construed to require some sort of "early" notice:

> "In the case of Muller, it appears that the negotiations for the lease of the new premises were protracted and involved many problems that were uncertain of satisfactory solution. It would hardly have been practical for Muller to publish an intention to relocate, thus inspiring almost inevitable protest, and go through an expensive hearing without knowing that the desired premises were available. It is also not hard to imagine the dampening effect upon the negotiations that would be imposed by the awareness of the long delay in completion of the transaction that any irresponsible protest could inherently cause."

440 F. Supp. at 441. Thus, the statutory construction suggested by appellants would not alter the constitutional questions presented here.

3. The Three-Judge Court Was Not Required To Abstain Pending Resolution of Any State Proceedings.

State Appellants contend, finally, that this Court should order abstention because two pending state proceedings, not involving appellees, *might* result in invalidation of the Act as "an invalid exercise of the police power under the California Constitution and an

impermissible delegation of legislative authority." Brief for State Appellants 62-63 & n.14. Abstention was not and is not required because the state constitutional issues cited by State Appellants merely parallel federal guarantees. *See supra* at 59." Moreover, the Board was enforcing the Act, as written, during the pendency of these state proceedings, a circumstance this Court has previously held counsels against abstention. *Gibson* v. *Berryhill,* 411 U.S. 564, 580 (1973).

To hold that abstention is required on the basis of the unsupportable and speculative contentions made by State Appellants would conflict with the recent admonition of this Court in *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 481 (1977):

> "As has been noted, *Pullman* abstention is an equitable doctrine that comes into play when it appears that abstention may eliminate or mate-

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[47] California determines whether a statute involves an "invalid exercise of police power" as a question of "substantive due process" under the federal Due Process Clause and the parallel state guarantee, now Calif. Const. Art. 1, § 13, as is demonstrated by the very cases relied on by State Appellants. *See, e.g., State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners, Inc.,* 40 Cal. 2d 436, 254 P.2d 29 (1953). And contrary to State Appellants' assertion, the Supreme Court of California has explicitly held that California courts may not inquire into the "wisdom" of economic regulation. *See, e.g., Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control,* 65 Cal. 2d 349, 359, 420 P.2d 735, 742, 55 Cal. Rptr. 23, 33 (1966) ("As we have said, we cannot invalidate legislation merely because we do not approve of its potentially beneficient impact . . . .") The question whether legislation involves an impermissible delegation of legislative authority is also parallel to inquiry under the federal due process prohibition against impermissible delegation. *See, e.g., Blumenthal* v. *Board of Medical Examiners,* 57 Cal. 2d 228, 236, 368 P.2d 101, 105, 18 Cal. Rptr. 501, 505 (1962); *State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners, Inc.,* 40 Cal. 2d 436, 448-49, 254 P.2d 29, 36 (1953).

rially alter the constitutional issue presented. There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented. That point has been reached and surpassed here."

B. Younger Abstention Would Have Been Completely Inappropriate Even If It Had Been Raised in a Timely Fashion.

For the first time in this litigation, it is argued that, in light of *Younger* v. *Harris*, 401 U.S. 37 (1971), the three-judge court should have dismissed the suit because of the pendency of the Fox and Muller protests before the Board.[48] No appellant made this argument below; indeed, State Appellants did not rely on *Younger* at all.[49]

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[48] This issue was not presented in either Jurisdictional Statement. *See* Juris. St. of State Appellants 4, 17-25; Juris. St. of Dealer Association Appellants 4.

[49] Dealer Association Appellants' motion to abstain below relied on *Younger* but was limited to urging dismissal because of the pendency of certain *judicial* proceedings ancillary to the Fox and Muller protests. In these judicial proceedings the protestants in the Fox and Muller cases sought to compel the Board to allow them to depose certain General Motors personnel. General Motors appeared as a real party in interest in that litigation, which was on appeal from the trial court's ruling when the instant suit was filed. (Plaintiffs' Reply of Aug. 19, 1976, to Intervenors' Antitrust and Abstention Arguments 10.) *Younger* could have no possible applicability to those state judicial proceedings. First, the judicial proceedings did not bear the slightest resemblance to the *enforcement* proceedings involved in *Younger* v. *Harris*, 401 U.S. 37 (1971), *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), *Juidice* v. *Vail*, 430 U.S. 327 (1977), and *Trainor* v. *Hernandez*, 431 U.S. 434 (1977). Second, appellees' attack on the constitutionality of the Act in no way sought to restrain the mandamus proceedings themselves. Finally, the state court proceedings had been concluded by the time the three-judge court rendered judgment in this case. In any event, this contention has not been revived.

Had the contention been advanced below, the three-judge court would properly have refused to dismiss. To begin with, *Younger* is not applicable to administrative proceedings brought by a private party, in which the state's own enforcement policies are not involved. *See Trainor* v. *Hernandez*, 431 U.S. 434 (1977) (protection of public fisc); *Juidice* v. *Vail*, 430 U.S. 327 (1977) (judicial contempt); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) (obscenity nuisance proceedings). But even if *Younger* were deemed relevant to proceedings similar to those before the Board, dismissal under *Younger* would have been inappropriate here. The predicate for a *Younger* dismissal is an "opportunity to raise and have *timely* decided by a *competent* state tribunal the federal issues involved." *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973) (emphasis added). As will be shown, the Board was not a "competent" state tribunal, so appellees clearly had no opportunity to obtain a "timely" resolution of their constitutional challenges.

Administrative agencies like the Board are not competent, as a matter of law or of fact, to resolve constitutional challenges to the statutes under which they operate. As a matter of California law, an administrative agency may not declare a state statute unconstitutional or refuse to enforce a statute on grounds of unconstitutionality.[50] Even if the Board could adjudicate con-

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[50] See Cal. Const. Art. III, § 3.5 (adopted June 6, 1978). Even before the recent adoption of Art. III, § 3.5, only those administrative agencies created by the state constitution were empowered to pass on the constitutionality of a state statute. *Compare Hand* v. *Board of Examiners*, 66 Cal. App. 3d 605, 619-20, 136 Cal. Rptr.

stitutional issues, California itself would view the Board as incapable of resolving such issues "competently." As the Supreme Court of California has said:

> "It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions."

State v. *Superior Court,* 12 Cal. 3d 237, 251, 524 P.2d 1281, 1290, 115 Cal. Rptr. 497, 506 (1974). The Board, which is also a "predonderantly lay" body, is the very kind of agency the court had in mind.[51]

Clearly, then, the protest proceedings offered a completely inadequate forum for resolution of appellees' constitutional challenges. State Appellants attempt to brush aside this glaring deficiency by arguing that the unconstitutionality of the Act could have been raised in court review of the administrative proceedings if the protests had terminated adversely to appellees. The Court rejected this very contention in *Gibson* v. *Berryhill,* 411 U.S. 564, 577 (1973), because court re-

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187, 196 (1st Dist. 1977), *with Southern Pacific Transportation Co.* v. *Public Utilities Commission,* 18 Cal.3d 308, 556 P.2d 289, 134 Cal. Rptr. 189 (1976). The Board was created by statute, Cal. Veh. Code § 3000, and therefore is barred from adjudicating constitutional issues.

[51] The Board is required by statute to include five public members, only one of whom is to be a lawyer. Additional members of the Board are licensed dealers who may not participate in the resolution of protests. Cal. Veh. Code §§ 3000, 3001, 3050(d).

view proceedings do not provide a "timely" forum."[52] This is especially true in a case such as this one. Appellees could obtain judicial review only if a permanent injunction had been issued by the Board. If a reviewing court upheld the Board's permanent injunction on the merits, the court would be unlikely to conclude that the temporary injunction had been improvidently granted. And if the court reversed on the merits, the constitutionality of the temporary injunction would likewise never be reached. Moreover, even if a state court somehow reached the constitutional objections, an irreparable constitutional violation would have occurred during the many months the temporary injunction, automatically issued, had been in effect without any notice, hearing, or other state review. Finally, since protests are in fact almost never upheld on the merits, a manufacturer in particular could be subjected time and time again to unconstitutional temporary injunctions without ever obtaining judicial consideration of the constitutional challenges presented here.[53]

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[52] Moreover, Fox and Muller, the two parties most disastrously affected by an adverse decision on the merits, would not be able to appeal from an adverse decision by the Board. *See supra* at 8 n.10.

[53] In fact, *Younger* is inapplicable because of the very multiplicity of the protests to which manufacturers and dealers may be subject. *Younger,* its predecessors, and its successors have dealt with a "single" judicial proceeding. *See, e.g.,* 401 U.S. at 46; *Beal* v. *Missouri Pacific R.,* 312 U.S. 45, 50 (1941); *Kugler* v. *Helfant,* 421 U.S. 117, 124 (1975). When a party is subjected to a multiplicity of proceedings, he suffers far more than "the cost, anxiety, and inconvenience of having to defend against a single [proceeding]." *Younger* v. *Harris,* 401 U.S. at 46; *see also Spielman Motor Co.* v. *Dodge,* 295 U.S. 89 (1935). The great hardship of defending multiple proceedings constitutes an "exceptional circumstance" under which *Younger* is not applicable. *See* 401 U.S. at 53-54.

All of the foregoing, however, is largely academic. As a direct consequence of State Appellants' failure to raise the issue below, any force that a timely *Younger* motion might have had is now completely dissipated. The protests involving Fox and Muller proceeded to completion, ending favorably to Fox, Muller, and General Motors on the merits, before decision on appellees' motion for partial summary judgment. (Jennings Affidavit of Oct. 11, 1977, at 5-6, attached as Ex. E to the Application for Order Staying Judgment presented to Mr. Justice Rehnquist.) Thus, the injunction below did not in fact interfere with the conduct or disposition of the protests pending when suit was filed, *compare Trainor* v. *Hernandez,* 431 U.S. 434, 445-46 (1977), and the suit in effect became one for prospective relief only, a situation in which *Younger* is not applicable. *See, e.g., Wooley* v. *Maynard,* 430 U.S. 705 (1977). *Younger* can hardly demand the futile act of undoing the judgment below simply because the three-judge court had the case under submission as the protests proceeded to conclusion.[54] *See Bellotti* v. *Baird,* 428 U.S. 132, 143 n. 10 (1976).

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[54] The principles underlying *Younger* are not jurisdictional in nature. *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 480 (1977); *Sosna* v. *Iowa,* 419 U.S. 393, 396 n.3 (1975). In light of the failure of any appellant to raise this issue below or in a Jurisdictional Statement, *see* Sup. Ct. Rule 40(d)(2), the Court should not reach the issue at all. *See Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 468 n.5 (1976). In any event, State Appellants' contention must be evaluated in light of their failure to raise it in a timely fashion, as discussed in the text.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge court should be affirmed.

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July 7, 1978